



REPORT OF THE ADJUDICATOR

WASPA Member (IP):	2waytraffic
Service Provider (SP): (if applicable)	Mira Networks
Service Type:	Subscription
Complainant:	Competitor
Complaint Number:	11066
Code version:	Code v 10.0 and Ad Rules v 2.3
Date of Report:	31 December 2010

Complaint & Response

1. This Complaint involves allegations of “bundling”. It was initially directed against the SP on the 9th of November 2010, but was redirected against the IP (hereafter the “Member”) on the same day on the basis that the relevant short code was allocated to the IP, and that the IP is an affiliate member of WASPA. This complaint is hence against the IP alone.
2. The Complainant is a Competitor, and gave the substance of the complaint as follows:

Detailed_Description_Complaint: Bundling - this is a subscription service which is hiding behind get the vuvuzela on your phone.
3. The Complainant was of the view that the advertisement infringed sections 11.1.2, 11.2.1 and 11.2.2 of the Code of Conduct.
4. The Member furnished a response per email on the 12th of November 2010, which included a description of the opt-in procedure used from the subscription service, a copy of the standard message logs, and screenshots of the log-in screens.
5. It is not clear whether the Complainant provided a copy of the advertisement complained of so that the Member could identify the advertisement / service in question. Certainly the Adjudicator was not furnished with any copy of the advertisement provided by the Complainant. The Member in its response, however, seemed in no doubt as to what advertisement the Complainant was referring to, and so the Adjudicator will proceed on the basis that the

documentation provided by the Member accurately reflects the service complained of.

6. The Member's formal response can be summarised as follows:
 - 6.1. It took the complaint very seriously, was fully aware of the importance of protecting consumers in the marketing and sale of premium rates services and intended to co-operate with WASPA fully in resolving this matter.
 - 6.2. The "Vuvuzela-offer" was in accordance with the "newest WASPA regulations" and that it was clearly stated in the advertisement and the "sms flow" that this is a subscription service.
 - 6.3. The Member advised that if it were given the Complainant's MSISDN it would be able to investigate the complaint more thoroughly.
 7. The annex to the Member's response, containing the standard message logs, and screenshots of the log-in screens is attached as Annexure "A".
 8. The Complainant advised on the 15th of November that as the complaint was in respect of the advertisement alone, it was not necessary to provide an MISDN, and that as it was not satisfied with the Member's response, the complaint should be referred for formal adjudication.
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Portion of the Code Considered

9. As the conduct complained of occurred in November 2010, version 10.0 of the WASPA Code of Conduct applies to this complaint. The following sections of the Code of Conduct are relevant:
 - 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.
 - 11.1.2. An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed, except as provided for in 11.1.3.
 - 11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.
 - 11.2.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.
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Decision

10. The Adjudicator loaded the website in question (at URL <http://minisites.mypengo.com/default.aspx?&siteid=31304005>) on both a web browser and a cellphone on the 28th of December 2010. The site seems to be designed for a web browser and not as a WAP site, as the site was hopelessly too large for a cellphone screen.
11. No information was provided as to how consumers would be directed to the website in question, but once the consumer loaded the website, the process flow was as set out in Annexure "A". There is little point in repeating the process here, as it is clear enough from the Annexure, but the following should be noted:
 - 11.1. The main "call to action" in all the screenshots provided is the phrase "Vuvuzela on your mobile!" The consumer is given the chance to "listen here to the Vuvuzela ringtone" as advertised in slightly smaller script at the bottom left of the screen in screenshots 1 & 2. The following appears in a small script at the bottom of the main "block" just above the terms and conditions: "This service includes the vuvuzela wallpaper + many other ringtones, wallpapers, games and more from the Mypengo collection."
 - 11.2. The words "subscription service" DO appear, but they are in small print below the "Continue" button in in screenshots 1 & 2, as well as in the terms and conditions.

Identification as "Subscription Service" (section 11.1.1)

12. Section 11.1.1 obliges members to "prominently and explicitly identify subscription services as such. In the provided screenshots, the words "subscription service" are displayed in a small font, and are clearly not prominent. Nor would the consumer be able to see from any other prominent feature that the service is a subscription service. Consequently, the Member has infringed section 11.1.1 of the Code of Conduct.

Provision of Two Content Items (Section 11.1.2)

13. Section 11.1.2 is unambiguous in requiring at least two examples of content where a subscription service is advertised. According to the small print in screenshots 1 & 2 this service includes various vuvuzela downloads as well as other, presumably unrelated, ringtones, wallpapers and games. The main "call to action" however, to get "vuvuzela on your mobile", does not make clear what content items are on offer. The only content item featured is the vuvuzela ringtone, which can be accessed by clicking the button on the screen marked with a musical semi-quaver. Hence only one content item is advertised with the "vuvuzela" category of content items, which itself makes up only a portion of the content items available for download under the subscription service. As a result, the Adjudicator finds that the member has infringed section 11.1.2 of the Code of Conduct by only displaying one content item.

Automatic Subscription (Section 11.2.1)

14. The “call to action” in screenshots 1 & 2 is to obtain the “vuvuzela on your mobile”. The fact that this results in subscription to a subscription service is not clearly brought to the consumer’s attention. The words “subscription service” are, as stated above, not at all prominent as required by section 11.1.1 of the Code of Conduct.
15. The message log provided by the Member makes it clear that consumers are only subscribed to the subscription service AFTER they have entered a PIN sent to their mobile phones, as required in section 11.3.1 of the Code. A welcome sms is then sent to consumers as required by section 11.5.
16. While the welcome sms MAY have the effect of alerting consumers to the fact that they have unwittingly subscribed to a subscription service, the purpose of section 11.2.1 is to prevent such subscriptions from occurring in the first place.
17. The effect of the website complained of is to automatically subscribe consumers to a subscription service where they may have thought that they were purchasing a single content item. However, this scenario is not covered by section 11.2.1. The section is divided into two parts. The first part forbids subscription to a service as a result of a request for “...any non-subscription content or service.” In this case the content WAS part of the content available for download by subscribers. The second part of the section forbids subscription where consumers have not specifically opted in to that service. An sms is sent to consumers with a PIN advising them that they will be subscribed if they continue, which satisfies this requirement.
18. As this section sets an objective test, and the consumers’ impression is not relevant, the Adjudicator is of the view that section 11.2.1 of the Code of Conduct is not germane to this set of facts, and that the Member has consequently not infringed this section.

Independent Transaction (Section 11.2.2)

19. The same cannot be said for section 11.2.2. This section also has two parts. The first part says that a request to join a subscription service must be an independent transaction with the intention of subscribing to the service. The Adjudicator finds that it is most likely that a consumer would be under the impression that he / she is downloading a single content item under these circumstances, and that accordingly the consumer would not have the intention to subscribe to the service but merely to get the single content item.
20. The second part of the section is more specific, and says that a request to join the subscription service may not be a request for a single content item. It is most likely that in these circumstances just this would happen.
21. The Adjudicator is accordingly of the view that the Member has infringed section 11.2.2 of the Code of Conduct.

22. In summary, the Adjudicator is of the view that the advertisement is misleading to consumers who could very easily go through the process of ordering the ringtone and then find themselves subscribed to a subscription service. The words “subscription service” should be far more prominent, it should be clear from the website that by downloading the vuvuzela ringtone, wallpaper etc. the consumer will be subscribed to a subscription service, and there should be more than one content item displayed to drive the point home.
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Sanction

23. The impression gained by the Adjudicator in this matter is that the Member had no intention of misleading consumers in developing the website and subscription process in the manner in which it did.
24. This impression is strengthened by the Member’s record with WASPA – it joined the association in December 2006 and has only two previous complaints against it in that time. Both complaints were brought in 2008 and neither related to subscriptions services.
25. An aggravating factor in all complaints regarding subscription services, of course, is the significant potential for prejudice to consumers, which must also be taken into account.
26. In light of the above, the Adjudicator imposes the following sanction:
 - 26.1. The Member is issued with a formal reprimand, and
 - 26.2. The member is fined the amount of R 2 500 for each of its infringements of section 11.1.1, 11.1.2 and 11.2.2 for a total of R 7 500.

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Annexure A

ANNEX: Vuvuzela SA



1. URL Website:

<http://minisites.mvopeno.com/default.aspx?&siteid=31304005>

2. Opt-in procedure/ Messages:

- a. *User subscribes via our website by filling out her/ his telephone number (screenshot 1)*
- b. *Confirmation MT:*
7994 = Yr PIN<< u'll b subscribed to Ringtop20 from 2waytraffic. R20 sign up and R30/week. Help?0861106472 To unsubscribe sms stop to 31304 >
- c. *User enters pin code on webpage (screenshot 2)*
- d. *User will be subscribed (screenshot 3) and receives a Welcome message (FREE MT):*
Welcome: Welcome to Ringtop20 subscription service, stay tuned for your content! R30/week. To unsubscribe sms stop to 31304.Help? 0861106472
- e. *User will receive the service content:*
- f. *Ringtop20 MT (billed MT):*
Did you know that Ringtop20 offers the latest hits, hottest applications and coolest wallpapers for your mobile phone? Stay tuned and find out!
- g. *Ringtop 20 MT (billed MT):*
>>RINGTOP20<< Enjoy all the hottest ringtones and hottest wallpapers! Make sure you personalize your phone every week!
- h. *Ringtop20 MT (billed MT):*
Stay tuned to Ringtop20 your favourite entertainment station & receive your new mobile item shortly, make sure your wap configurations are set correctly.
- i. *Ringtop 20 MT (billed MT):*
Vuvuzela ringtone
Vuvuzela<http://cd.mvopeno.com/1740/Vuvuzela>
- j. *Ringtop 20 MT (billed MT):*
Vuvuzela wallpaper
Vuvuzelawal<http://cd.mvopeno.com/1740/Vuvuzelawal>
- k. *STOP confirmation message*
You are successfully unsubscribed from the Ringtop20 service. For help call: 0861106472 or e-mail info@mobilefun4you.com

3. Advertisement Vuvuzela:



Screenshot 1:

This service includes the vuvuzela wallpaper



+ many other ringtones, wallpapers, games and more from the Mpegno collection.

This subscription service is available for all networks. You will receive 3 ringtones per week (R1) plus 50 subscription service (R20) (ring tone and R20 a week), all prices include VAT. Some card charges may apply. The above items form part of the subscription service and (where) indicated of the content items that will be received. To cancel the service, send STOP to 31394. Please [click here](#) to see full terms and conditions. All prices in rands (R) and are subject to change without notice. The promotion above is for entertainment purposes only. MPEGNO operates according to the South African Wireless Application Service Providers Association Code of Conduct. MPEGNO offers you fun entertainment for your mobile, such as ringtones, games, wallpapers and ringtones. To find out more information on our services, please visit <http://mpegnoringtones.com>. For help please call our helpdesk at 0800 106472 or email: info@mpegnoringtones.com

Screenshot 2:



Support your favourite worldcup 2010 team with the

VUVUZELA

on your mobile!

Enter your 4 digit personal pin:

In 10 seconds we are sending you a text message with your personal pin.

Continue

Listen here to the Vuvuzela ringtone

This service includes the vuvuzela wallpaper



+ many other ringtones, wallpapers, games and more from the Nspengo collection.

This subscription service is available for all networks. You will receive 3 content items per week (Ringtones 20 subscription service, R20 joining fee and R30 a week, all prices incl. 15% VAT). Download charges may apply. The shown item(s) form part of the subscription service and is/are indicative of the content items that will be received. To cancel the service, send STOP to 01206. Please [click here](#) to see full Terms and Conditions. 18+ (parental permission required). Min. age: 18+ (with permission of parent or guardian). The promotion above is for promotional purposes only. MIPCHGO operates according to the South African Wireless Application Providers Association Code of Conduct. MIPCHGO offers you fun entertainment for your mobile, such as java-games, games, wallpapers and ringtones. To find out more information on our services, please visit <http://www.nspengo.com>. For help please call our helpline at 0861108472 or for e-mail info@nspengo.com.

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Screenshot 3:



Support your favourite worldcup 2010 team with the
VUVUZELA on your mobile!

The Vuvuzela ringtone will be sent to your phone shortly!
Enjoy!
Make sure you keep an eye on Ringtop20 in the future.

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